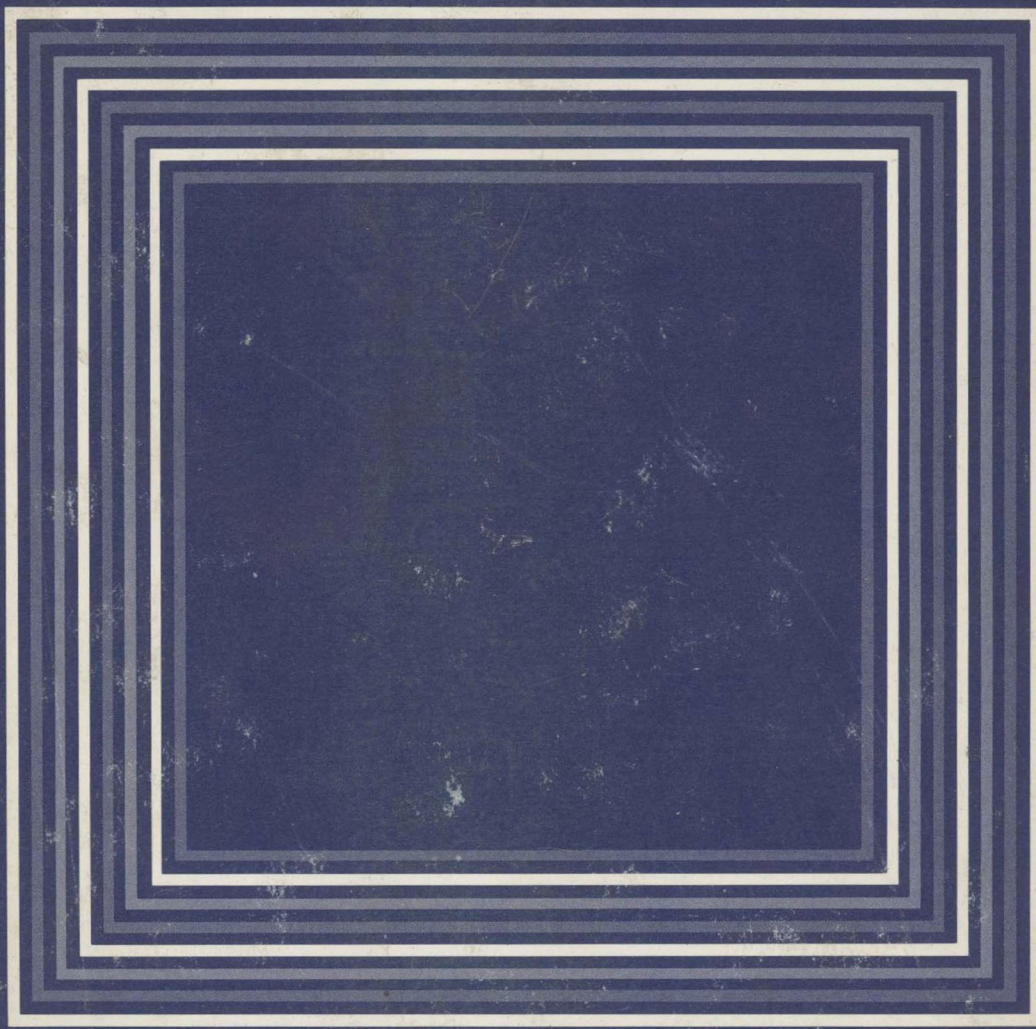
DISCRETIONARY JUSTICE
A Critical Inquiry

PAUL E. DOW



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A Critical Inquiry

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DISCRETIONARY JUSTICE

DEDICATION

For Jo-Anne Sessa
I wrote, and she endured

PREFACE

Scholars representing the disciplines of psychology, sociology, and political science have made significant contributions to what has come to be called "public law." In its broadest sense, public law encompasses the study of individual or group activity within the legal environment generally affecting society. Representative issues of inquiry include "psychiatric justice," "sociology of law," the "politics of justice," and "civil rights." Social scientists have generally utilized disparate methodologies in attempting to unlock the intimate secrets that are often shrouded by legal verbiage and confusing court procedure. Yet the foci of the inquests have been surprisingly similar. Studies are typically predicated on the suspicion that legal behavior does not conform to the directives outlined by the law in the books. The resultant investigations have left the "slot machine theory" of justice irreparably discredited.

The current work buoys the notions of the so-called "legal realists." Specifically, rights do not necessarily emerge from rules; they often must be extracted from the fortified confines of the legal milieu. One's success in achieving justice generally is dependent upon a variety of extralegal variables that are themselves the product of numerous fortuitous criteria. The public, police, prosecuting and defense attorneys, bondsman, judge, and jury represent the primary hurdles interfering with the ideal of justice. If the American concept

of the justice imperative is designed to reflect those ends often associated with "bureaucratic" models, then the public is being reasonably well served. But even a casual reading of the U.S. Constitution generates visions of an adversarial model of justice in which cooption of legal actors for the express purpose of expediting nebulous procedures is forbidden.

To what extent are codes, including statutes and the Constitution, ignored? Does our present system of justice reflect a due process or crime control model? What are the root causes for the inception and perpetuation of the bureaucratic rather than the adversarial legal system? Is the system beyond redemption? Each chapter begins with a description of a particular legal institution that reflects what the author perceives as the manner in which the framers of the Constitution intended the system to function. The extent to which intended functions are implemented follows. Finally, the primary barriers affecting the perceived appropriate operating procedures are analyzed.

February, 1981 **Paul E. Dow**
Bethlehem, Pennsylvania

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1 INTRODUCTION

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Opinion in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943).

OVERVIEW

The inception and development of the American legal system was the end product of dissatisfaction with legal environments predating the American Revolution. Our founding fathers attempted to insulate the legal milieu from the effects of so-called "political" decisionmaking; Resolution of legal responsibilities and rights was ultimately to be derived from "impartial" institutions (i.e., courts). It was hoped that judicial decisionmaking would result free from pressures of political actors (e.g., mayors, governors, senators) or even of community values (e.g., norms, customs, traditions, folkways, mores).

Although political actors (e.g., legislators) indeed write laws, and these codes often reflect community values, decisions affecting the accused were to be controlled by written (official) laws. Specifically, "lobbying" courts, judges, and jurors for "legal favors" was to be taboo, assuring equal treatment before the law.

Recently, a growing number of legal scholars suggest that the extent of "extralegal" input affecting the legal environment has become pervasive. These linkages relate both to legal institutions (e.g., courts) and to legal process (e.g., lawmaking, arrest, determination of guilt, sentencing). As illustration, Professor Cole notes:

> The confluence of law, administration, and politics results in a system in which officials who are sensitive to the political process make decisions at various points concerning the arrest, charges, conviction, and benefits of the political system. Thus the judicial process induces conditions that are important to legal actors' political needs. Criminal prosecutions provide opportunities for the political system to affect judicial decisions and for the judicial process to provide favors that nourish political organizations.[1]

Moreover, Herbert Jacob states: "[E]ach component of the judicial process is the product of political conflict."[2] And according to Howard Ball, misleading conclusions about legal institutions result if the researcher ignores the "political" dynamics: "[T]he structure and the dynamics of the federal courts and of the judicial process are grounded in politics. . . . Without such an understanding of the impact of politics on the federal judicial system there can be no true awareness of the realities of the federal judicial system."[3] More critical writers like Richard Quinney relate a kinship between lawmaking and deviant behavior. Quinney declares that the lawmaking process is politically charged and designed to benefit persons in power to the detriment of those persons seeking power. The reaction to laws developed in capitalist legislatures produces reactionary criminal behavior that is "politically conscious."

> With the instruments of force and coercion on the side of the capitalist class, much of the activity in working class struggle is defined as criminal. Indeed, according to legal codes, whether in simply asking to relieve the injustices of capitalism or in taking action against the existence of class oppression, actions against the interests of the state are crimes. With an emerging consciousness that the state represses those who attempt to tip the scales in favor of the working class, working class people engage in actions against the state and the capitalist class. This is crime that is politically conscious.[4]

Theodore Becker's conception of law and politics extends the remarks of Quinney from the occurrence of so-called politically conscious criminal behavior to the "political trial."

> What makes the trials of such various individuals as Jesus, Captain Dreyfus, Socrates, Joan of Arc, Tom Mooney, and Sir Thomas More political is something else. In each case, men in power believed the defendant to be threatening them in some way. This is not to say that Jesus or Sir Thomas More broke no laws. Rather, that perception of a direct threat to established political power is a major difference between political trials and other trials.[5]

If, indeed, decisionmaking in the legal environment is often affected by other formal and informal bureaucracies, what is the most appropriate method for investigating these relationships? Studies examining legal institutions no doubt render important data. However, typical "institutional" investigations tend to be descriptive in nature and to produce limited insight into the conduct of human interaction. Moreover, these studies generally presume that legal actors behave in a manner consistent with what are called the "rules of the game" or the "law in the books."[6] Other scholars deemphasize the study of legal institutions, favoring instead investigations examining the effects of individual and collective decisionmaking vis-à-vis legal idealism. These scholars reject notions suggesting that legal outcomes (decisions) are the product of court structure (established rules). By way of illustration, Charles Sheldon notes:

> The law is what the courts say it is. Law is the behavior of those people who practice, define, and enforce that body of prescriptions called law. If we want to understand the law (or the judicial process), we must understand the people who work with laws. The issue among the various schools of jurisprudence need not be joined here. The above expressions do not exclude the ideals or "oughts" of law—the forces of custom, natural law, comity, or precedence. It merely means that an understanding of those who establish, apply, interpret, and enforce the law.[7]

Discretionary decisionmaking within legal institutions represents a prime example of what David Easton calls "authoritative decision making."[8] Authoritative decisions are pronouncements affecting society generally. Moreover, persons to whom these decisions (commands) are directed "consider they must or ought to obey it."[9] In the legal environment, these commands are enforced—and legitimized—through the use of a variety of legal sanctions. Moreover, authoritative legal decisions emerge from institutions sanctioned by

citizen-approved government bureaucracies. Decisions or commands considered not authoritative, hence "nonpolitical," emerge from institutions not sanctioned by the general populace. These institutions include clubs or organizations such as church assemblages or coin and stamp associations and all related groups that only have force (power) over the members in the collective order. Decisionmaking in these gatherings remains nonpolitical, hence generally unenforceable, until incorporated as policy by "official" government organizations.

Decisionmaking within national and local legal institutions represents officially sanctioned policy generally affecting society. Examples of these "public law" decisions involve a wide range of topics, including proper arrest, search and seizure procedures, discretionary law enforcement, and trial rights. Moreover, these decisions are authoritative. Even unsuccessful litigants and interested "outsiders"[10] generally accept decisions rendered by local and national courts. If organized opposition emerges, other official political channels may be engaged in attempts to nullify the unfavorable ruling. For example, direct appeals may be sought in higher courts. Less direct strategies include activating the electorate, lobby groups, or legislators for the purpose of developing more favorable laws. Moreover, authoritative decisions may be altered through nonenforcement or selective enforcement by various legal actors including police, prosecutors, jurors, and judges.

Discretionary Decisionmaking

This study focuses on the dynamics of discretionary decisionmaking. Justice, at least in American jurisprudence, gains its vitality from the legal concept "due process." Due process entails all liberties extended to citizens by the authoritative decisionmakers in the legal environment. In this regard, procedural due process liberties delineated in the Bill of Rights and the mechanisms used to implement those liberties are included. The discretionary behavior involved in defining criminal activity and apprehending, prosecuting, convicting, and sentencing persons accused of violating the legal codes are analyzed, as are the techniques used to implement the rules of the game associated with the trial process.

The main premise of this work suggests that legal outcomes are often the product of discretionary (haphazard, quixotic) decision-

making. Moreover, the political and social environment dramatically affects the decisionmaking. Stuart A. Scheingold adequately outlines the extent of the indictment:

> The political approach thus prompts us to approach rights as skeptics. Instead of thinking of judicially asserted rights as accomplished social facts or as moral imperatives, they must be thought of, on the one hand, as authoritatively articulated goals of public policy and, on the other, as political resources of unknown value in the hands of those who want to alter the course of public policy. The direct linking of rights, remedies, and change that characterizes the *myth of rights* must, in some, be exchanged for a more complex framework, the *politics of rights*, which takes into account the contingent character of rights in the American system.[11]

The current work separates discretionary justice into two categories—explicit (de jure) and implicit (de facto) activity. The former description includes such things as elections and appointments of legal actors, the structure and intended function of legal institutions, and lawmaking by "appropriate" officials. Implicit activity generally describes the existence and effects of discretionary yet authoritative (de facto, extralegal) decisionmaking in the legal environment. Included in these categories are discussions about the political use of crime statistics and "law and order" rhetoric, the relationships between access to legal power (remedies) vis-à-vis individual social economic status characteristics, legal socialization, public participation in the legal process, and "lawmaking" by "inappropriate" personnel in the legal milieu. Finally, this work also examines those areas of the legal environment often described in traditional criminal justice textbooks, including the primary actors associated with the legal process. Lawmaking, crime, police behavior, and in particular, the arrest power, the preliminary hearing, grand jury, bail, the bail bondsman, the prosecuting and defense attorneys, the defendant, the trial process, plea bargaining, and the role of the judge and jurors are described and analyzed.

Justice

In the American criminal justice system the concept "justice" embodies the right to receive basic procedural due process considerations before an arrest may be made and until such time as the accused has been provided a trial, sentenced, or acquitted. It is commonly believed that justice is an inalienable right not dependent on